Supreme Court, U.S.
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No. _____

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In The

# Supreme Court of the United States

ROBERT RAY,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Was petitioner denied his Sixth Amendment right to the effective assistance of counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984) when counsel failed to request a jury instruction that the complainant's prior consistent statements were not admissible as substantive evidence?

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Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when, at trial, his attorney failed to request a jury instruction that the complainant's prior consistent statements could not be considered by the jury as substantive evidence.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner Ronald Ray respectfully prays that a writ of certiorari issue to review the non-precedential decision of the Superior Court of Pennsylvania entered in the above-entitled proceeding on July 1, 2003, as to which the Supreme Court of Pennsylvania denied an allowance of appeal on February 27, 2004.

## OPINIONS BELOW

The non-precedential decision of the Pennsylvania Superior Court dated July 1, 2003, No. 1005 MDA 2002, affirming the Order entered May 24, 2002, denying request for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546, which is the subject of this Petition, is unreported. *Appx.* A. The following Orders and Memorandum Opinion are unreported: The Memorandum Opinion of Jeffrey L. Schmehl, Judge, Court of Common Pleas, Berks County, Pennsylvania dated October 7, 2002, *Appx.* B; Judge Schmehl's Order entered May 29, 2002, *Appx.* C; and, the Order and Notice of Intent to Dismiss of Judge Schmehl, dated April 29, 2002. *Appx.* D. The unpublished memorandum of the Pennsylvania Superior Court affirming the judgment of sentence is reported at 769 A.2d 1208 (Pa. Super. Ct. December 12, 2000). *Appx.* E. The order of the Pennsylvania Supreme Court denying Petitioner's request for an allowance of appeal to review the denial of the request for collateral relief is reported at ___ A.2 ___, No. 551 MAL 2003, 2003 WL 367707 (Pa. February 27, 2004) *Appx.* F.

## JURISDICTION

The Pennsylvania Supreme Court denied the Petitioner an allowance of appeal on February 27, 2004. *Appx.* F. The Pennsylvania Superior Court, an intermediate appellate court, affirmed on July 1, 2003, the Order of the Honorable Jeffrey L. Schmehl, entered May 24, 2002, denying a request for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546, which is the subject of this Petition. *Appx.* A. Petitioner noted for the Superior Court that he had been denied the effective assistance of trial and appellate counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), in violation of his right to counsel under the Sixth Amendment to the United States Constitution. The jurisdiction of this Court to review the decision of the Pennsylvania Superior Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

A jury in Berks County, Pennsylvania found Petitioner guilty of Incest[1], Statutory Sexual Assault[2], Involuntary

[1] 18 Pa. C.S.A. §4302.

[2] 18 Pa. C.S.A. §3122.1.

Deviate Sexual Intercourse[3], Aggravated Indecent Assault[4] and Indecent Assault[5] on May 12, 1999. *Appx.* E-1. The charges were based upon the allegations of Petitioner's daughter, Leah Ann Ray, who claimed that Petitioner had sexually assaulted her on a number of occasions. The Court of Common Pleas sentenced Petitioner to a total of 88 to 240 months incarceration on June 28, 1999, a sentence which Petitioner is currently serving. *Appx.* E-9.

The Superior Court of Pennsylvania, an intermediate appellate court, affirmed the judgment of sentence in a memorandum opinion dated December 12, 2000. *Appx.* E. Petitioner filed an Allowance of Appeal with the Supreme Court of Pennsylvania, but the petition was returned as untimely. *Appx.* A-2. A subsequent petition for *nunc pro tunc* allowance of appeal was denied on March 19, 2001. *Id.*

Petitioner thereafter pursued post-conviction remedies. On January 8, 2002, Petitioner filed a Petition for Relief under the Post Conviction Relief Act, 42 Pa. C.S.A. §9541 et seq., [PCRA Petition] which he supplemented on April 1, 2002. *Appx.* A-2. The Court of Common Pleas ultimately dismissed the PCRA Petition on May 24, 2002, after giving notice of its intention to do so on April 29, 2002. *Id.* In a non-precedential decision dated July 1, 2003, the Superior Court of Pennsylvania affirmed the decision of the Court of Common Pleas. *Appx.* A. The Supreme Court of Pennsylvania denied Petitioner's

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[3] 18 Pa. C.S.A. §3123.

[4] 18 Pa. C.S.A. §3125.

[5] 18 Pa. C.S.A. §3126.

Petition for an Allowance of Appeal on February 27, 2004. *Appx.* F.

In January 1998, Rebecca Bechtel, the mother of the complainant and ex-wife of the Petitioner, went to the Berks County Children and Youth Services ("CYS") complaining that the Petitioner had sexually assaulted their daughter, the complainant. The CYS issued a report dated March 11, 1998 informing the Petitioner and the Pennsylvania State Police that the allegations were "unfounded." Notwithstanding the "unfounded" CYS report, charges were lodged against Petitioner, including Incest, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault and Indecent Assault.

The matter went to trial before the Honorable Jeffrey Schmehl and a jury. The complainant, her brother Samuel Ray, and Rebecca Bechtel, were three of the witnesses who testified for the Commonwealth. The complainant testified to numerous instances of sexual abuse. The first instance of abuse allegedly occurred in the summer of 1993 inside of Petitioner's truck after a softball game complainant played in. The next instances of sexual abuse, according to the complainant, began in March 1994 while she lived with Petitioner and Marti Brumm, Petitioner's then-wife, in a trailer home, and continued on a regular basis until August 1995, when complainant moved out of the trailer home. The final incident allegedly occurred on New Year's Day 1996. *Appx.* E-2.

To corroborate complainant's testimony, the Commonwealth called Rebecca Bechtel and Samuel Ray to testify about certain prior consistent statements the complainant had made to them over one year after she allegedly was sexually assaulted by Petitioner. *Appx.* A-3.

Samuel Ray testified that the complainant told him that Petitioner had molested her and went on to testify about the details of the alleged assaults, as recounted by the complainant. *Id.* Ms. Bechtel likewise testified about statements the complainant made concerning the alleged assaults. *Id.* Although Pennsylvania law did not allow these prior consistent statements to be introduced as substantive evidence, trial counsel never asked the trial court to give the jury a limiting instruction in this regard. *Appx.* A-5.

Petitioner testified in his own defense and categorically denied the allegations of the complainant. Petitioner's account was corroborated by Marti Brumm, who testified that nothing remotely consistent with the complainant's allegations of sexual assault occurred while she shared the trailer home with Petitioner and the complainant. She also testified that Petitioner did not own a truck in 1993, the year the first sexual assault allegedly took place. Betty Fox, complainant's paternal grandmother, testified concerning matters which also contradicted complainant's story. Ms. Fox corroborated the testimony that Petitioner did not own a truck in 1993; contradicted complainant's claim that she played softball in 1993; and recounted a conversation between Petitioner and complainant in January 1998 where Petitioner counseled complainant to follow her mother's instructions.

The trial was therefore a paradigm of diametrically opposing versions which the jury had to reconcile. Although Petitioner ultimately was found guilty, the closeness of the case was reflected by the request of the jury to have the trial court redefine reasonable doubt.

## REASONS FOR GRANTING THE WRIT

Under Pennsylvania law, a prior consistent statement is not admissible as substantive evidence.[6] *Pa. R. Evid.* 613(c) ("Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes. . . ."). See also *Williams v. Love*, 1995 WL 303634 *5 (E.D. Pa. 1995), *citing*, *Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976) and *Commonwealth v. Cruz*, 489 Pa. 559, 414 A.2d 1032 (1980). A prior consistent statement may be offered, however, to rehabilitate a witness whose credibility has been attacked with a charge of recent fabrication or faulty memory. *Pa. R. Evid.* 613(c); *Commonwealth v. Counterman*, 553 Pa. 370, 405, 719 A.2d 284, 301 (1998). This case presents the Court with the opportunity to address a reality which occurs with regrettable frequency at trials in the criminal courts of the United States: the failure of defense counsel to have the trial court instruct the jury on the evidentiary purpose for the admission of certain evidence; in this case, the non-substantive nature of the prior consistent statements made by the complainant in this sexual abuse case.

The complainant testified that she was sexually abused by the Petitioner on repeated occassions from the summer of 1993 through New Years Day 1996. To corroborate her testimony, the Commonwealth called the complainant's mother and brother to testify about prior consistent statements the complainant had made to them more than one year after she allegedly had been sexually

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[6] A prior consistent statement may be admitted as substantive evidence under the Federal Rules of Evidence. *Fed. R. Evid.* 801.

assaulted by Petitioner. Trial counsel never asked the trial court to give the jury an instruction as to how these statements could be considered. The jury was left, then, to consider the prior statements for their truth rather than for rehabilitative purposes, the only reason they could be considered under Pennsylvania law. The absence of any instruction guiding the jury as to how to consider these prior consistent statements led directly to the guilty verdict, as reflected by the jury's request to be reinstructed on the definition of reasonable doubt. As a direct result of defense counsel's dereliction, Petitioner was denied his Sixth Amendment right to the effective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court considered for the first time a claim of actual ineffectiveness of counsel's assistance. The Court noted that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Id.* at 684. The Court established that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Court enunciated two components of a claim that counsel's assistance was sufficiently defective to require reversal of a conviction:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were

> so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 687.

The *Strickland* Court confirmed that "the proper standard for attorney performance is that of reasonably effective assistance." *Id.* In order to prove ineffectiveness, therefore, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Accordingly, a court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. See *Id.* The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690 Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. Accordingly, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance." *Id.* at 692. The Court in *Strickland* enunciated the following more precise

test for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The instant case presents a reoccurring example of defense counsel ineffectiveness in the courtroom: the failure to request jury instruction on the proper purpose for which certain evidence is admitted. The complainant testified that the sexual abuse began in the summer of 1993 when she was 12 years old. At that time, the Petitioner allegedly assaulted the complainant on one occasion inside of a truck[7] after a softball game. Notwithstanding this alleged assault, complainant moved into petition's trailer home in February 1994 where, she testified, the sexual assaults continued on a "pretty regular basis." These assaults included oral intercourse on repeated occasions and vaginal intercourse on one occasion. According to the complainant, the last assault occurred on New Year's Day 1996.

The first occasion complainant told anyone about the alleged sexual assaults was in the Spring of 1997, when she told her brother Sam that Petitioner had molested her. Complainant informed her mother of the alleged assaults in January 1998, which triggered the filing of the instant charges. If this testimony is believed, over one year passed between the last instance of assault on January 1, 1996

[7] The accuracy of the complainant's testimony concerning the first instance of sexual abuse was called in serious doubt when she testified that it occurred in a truck which Petitioner did not own until at least one year later.

and the first complaint to Sam in Spring 1997. Over two years passed between the last instance of assault and the complaint to the complainant's mother.

In *Tome v. United States*, 513 U.S. 150 (1995), this Court noted the distinction between prior consistent statements introduced as substantive evidence and prior consistent statements introduced for the limited purpose of bolstering the credibility of the witness who made them. In interpreting Rule 801(d)(1)(B)[8] of the Federal Rules of Evidence, the Court noted that Rule 801 defines prior consistent statements as non-hearsay only if they are offered to rebut a charge of "recent fabrication or improper influence or motive." The Court characterized the non-hearsay status of these types of prior consistent statements as "weighty," *id.* at 157, and admissible as substantive evidence, in contrast to consistent statements offered only to rebut an attack on the witness' credibility. As *Tome* makes plain, there is a significant difference as to how prior consistent statements are to be treated and considered by the jury. Without a limiting jury instruction, the distinction becomes one without a difference. See Graham, *Federal Practice and Procedure*, *Evidence* §7012 at 142 (2000) (the admissibility of prior consistent statements following impeachment of a witness is an extremely

[8] Rule 801 provides: "(d) Statements which are not hearsay. – A statement is not hearsay if – "(1) Prior statement by witness. – the declarant testifies at the trial or hearing and is subject of cross-examination concerning the statement, and the statement is . . . "(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

complex subject and jury should be instructed if statements are admitted for corroborative or substantive purposes).

In the instant case, there was no conceivable basis for counsel not to ask for a limiting instruction since under Pennsylvania law, the complainant's prior consistent statements were not admissible as substantive evidence. *Pa. R. Evid.* 613(c) ("Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes. . . . "). See also *Williams v. Love*, 1995 WL 303634 *5 (E.D. Pa. 1995), *citing*, *Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976) and *Commonwealth v. Cruz*, 489 Pa. 559, 414 A.2d 1032 (1980). Thus, Petitioner has satisfied the first prong of *Strickland* by showing that counsel's inaction fell below an objective standard of reasonableness in that he did not know the law regarding the limited evidentiary import of prior consistent statements at trial. Cf. *Everett v. Beard*, 290 F.3d 500, 513 (3rd Cir. 2002) (trial counsel ineffective in failing to know state of law regarding mental state of non-shooter necessary to sustain charge of first degree murder).

The second prong in *Strickland* is whether Petitioner was prejudiced by counsel's ineffectiveness. In evaluating whether a defendant has been prejudiced by defense counsel's errors, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by [counsel's] errors than one with overwhelming record support." *Strickland*, 466 U.S. at 695-96. Thus, the strength of the evidence is relevant in determining whether counsel's ineffectiveness prejudiced the defendant's right to a fair trial. *Buehl v.*

*Vaughn*, 166 F.3d 193, 170 (3rd Cir.), *cert. dismissed*, 527 U.S. 1050 (1999).

The Pennsylvania Superior Court held that Petitioner suffered no prejudice from trial counsel's failure to request a limiting instruction. *Appx.* A-5. The court noted that under *Commonwealth v. Gore*, 262 Pa. Super. 540, 396 A.2d 1302, 1307 (1978), the trial court *should* instruct the jury as to the limited import of prior consistent statements if requested to do so. *Id.* Nonetheless, the Superior Court went on to say that "[h]ad a limiting instruction been requested, there is no guarantee that the trial court would have granted the request." *Id.*[9] Thus, court ruled, Petitioner suffered no prejudice. *Id.*

Notwithstanding the Superior Court's semantic gymnastics and curious logic, counsel's failure to request a limiting instruction as to how the jury was to consider the prior statements of the complainant prejudiced Petitioner's right to a fair trial within the strictures of *Strickland*. The instant case was not one involving a defendant relying exclusively upon the presumption of innocence in defending against the charges. Rather, Petitioner presented an affirmative defense, through his own testimony, the testimony of Marti Brumm, who the complainant testified was present in the trailer home when the assaults took place, and Betty Fox, the complainant's paternal grandmother. Ms. Brumm, who had been divorced from

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[9] Superior Court was wrong in this regard as under *Pa. R. Evid.* 105, "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court upon request shall, or on its own initiative may, restrict the evidence to its proper scope and instruct the jury accordingly."

the Petitioner for two weeks prior to testifying at trial, testified that complainant had to be forced to visit her mother when she lived with Petitioner and Ms. Brumm at the trailer home in 1994-1995, the period during which all but two of the assaults allegedly took place. Ms. Brumm further confirmed that the truck in which the 1993 assault allegedly took place wasn't even purchased by Petitioner until 1994. Finally, Ms. Brumm, a light sleeper, never heard anything amiss during 1995 that would have been even remotely consistent with a sexual assault taking place inside the trailer home.

Betty Fox testified that the complainant was not playing baseball or softball in 1993 when, according to the complainant, the first instance of assault allegedly took place after a softball game; confirmed that the truck allegedly used in the 1993 assault was not purchased until 1994; and, recounted a conversation between Petitioner and complainant in January 1998 where Petitioner counseled complainant to follow her mother's instructions. Given the closeness of the case, and the jury's request to have reasonable doubt defined a second time, Petitioner was prejudiced by counsel's ineffectiveness.

There are policy reasons as well why this Court should grant a writ for a petition for certiorari and reverse the judgment of sentence. Too often, appellate courts are faced with a situation where counsel neglects to ask for a limiting or jury instruction on the purpose for which evidence is admitted. In that type of scenario, an appellate court engaged in direct review of the conviction is faced with analyzing whether the trial court committed plain error in admitting the evidence without the accompanying limiting instruction. See, e.g., *United States v. Sauza-Martinez*, 217 F.3d 754, 760 (9th Cir. 2000) (plain error

found in trial court's failure to give limiting instruction with respect to incriminating post-arrest admissions by co-defendant). In the context of collateral review under 28 U.S.C. §§2254 and 2255, the reviewing court is faced with the issue of whether trial counsel's failure to request a limiting instruction amounted to ineffective assistance of counsel within the meaning of *Strickland*. See, e.g., *United States v. Bastidas*, 28 F. Supp. 2d 1346, 1351 (M.D. Fla. 1998) (trial counsel not ineffective in failing to request limiting instruction as to the admissibility of certain evidence). In both situations, the reviewing court is left with divining whether counsel intentionally failed to request a limiting instruction for strategic reasons. See, e.g., *Buehl v. Vaughn*, 166 F.3d at 170 (in some circumstances, a limiting instruction may be strongly advisable; in others, counsel may reasonably conclude that it is strategically preferable to omit such a request since limiting instruction might have undesired effect of highlighting the particular evidence). Regardless of the situation, reviewing courts are forced to expend limited judicial resources and time, either under a plain error or *Strickland* analysis, in determining the propriety of counsel failing to request a limiting or jury instruction regarding the purpose for which certain evidence is admitted.

This Court can redress this wasteful expenditure of judicial resources by requiring counsel to advise the trial court in the first instance whether a limiting instruction on the admission of certain evidence should be given. If a limiting instruction is requested, it will be given by the trial court. See, e.g., *Fed. R. Evid.* 105. If trial counsel does not want a limiting instruction, because it might highlight unfavorable evidence, the trial court will then have a specific, and more importantly, on-the-record rationale for

purposes of post-conviction review. The salutary effect of this rule will be that the reviewing court will no longer have to guess as to what was in the mind of counsel when no limiting instruction was requested. Accordingly, the Court should grant the writ of certiorari and reverse the judgment of sentence.

## CONCLUSION

For the forgoing reasons, Petitioner ROBERT RAY prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the Superior Court of Pennsylvania dated July 1, 2003, No. 1005 MDA 2002 affirming the Order filed May 29, 2002 denying request for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§9541-9546.

Respectfully submitted,

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**NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P.65.37**

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| COMMONWEALTH OF PENNSYLVANIA, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellee | : | |
| v. | : | |
| RONALD L. RAY, | : | |
| Appellant | : | No. 1005 MDA 2002 |

Appeal from the PCRA Order dated May 24, 2002,
in the Court of Common Pleas of Berks County,
Criminal Division at No. 2845-98

BEFORE: JOYCE, KLEIN, JJ. and MCEWEN, P.J.E.

MEMORANDUM: FILED: July 1, 2003

This is an appeal from the order entered May 24, 2002 denying Ronald Ray's (Appellant) request for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §9541-§9546. For the reasons set forth below, we affirm.

The facts and procedural history of this case may be summarized as follows. On May 14, 1999, Appellant was convicted of incest, statutory sexual assault, involuntary deviate sexual intercourse, aggravated indecent assault and indecent assault.[1] He was subsequently sentenced to an aggregate sentence of 76 [sic] to 240 months' incarceration. Throughout his trial, Appellant was represented by Lawrence J. Hracho, Esquire. A Notice of Appeal to this

[1] 18 Pa. C.S.A. §§4302, 3122.1, 3123(a)(7), 3125(8) and 3126(a)(6).

Court was filed on July 27, 1999. On August 12, 1999, Mr. Hracho withdrew his appearance for Appellant. James R. Elliot, Esquire and Harold Kane, Esquire, subsequently represented Appellant on his direct appeal. On December 12, 2000, a panel of our Court affirmed the conviction and judgment of sentence. ***Commonwealth v. Ray***, 769 A.2d 1208 (unpublished memorandum). Appellant then filed a petition for Allowance of Appeal with our Superior [sic] Court, but the petition was returned as untimely. A subsequent petition for *nunc pro tunc* allowance of appeal, filed by Paul A. Bauer, III, Esquire, was denied on March 19, 2001. ***Commonwealth v. Ray***, E.D. Allocatur Docket No.10 MM 2001.

On January 8, 2002, Appellant filed a Petition for Post Conviction Relief (PCRA). On April 1, 2002, acting *pro se*, Appellant filed a "Supplement to Petition for Post Conviction Relief." On April 29, 2002, the trial court entered an Order and Notice of Intent to dismiss the PCRA Petition without hearing. The petition was subsequently dismissed on May 24, 2002. Mr. Bauer withdrew as counsel on June 13, 2002. Appellant, through his new counsel, appeals.

When examining a post-conviction court's denial of relief, our scope of review is limited to a determination of whether the court's findings are supported by the record and are otherwise free of legal error. ***Commonwealth v. Gaskins***, 692 A.2d 224, 226 (Pa. Super. 1997). The findings of the post-conviction court will not be disturbed unless they have no support in the record. ***Id***. Additionally, we note that there is no absolute right to a hearing pursuant to the PCRA. Rather, the post-conviction court may elect to dismiss a petition if it has thoroughly reviewed the claims presented and determined that they are utterly without support in the record. ***Id***.

Appellant first argues that trial counsel was ineffective for failing to object and not attempting to limit the testimony of the victim's brother, Samuel Ray and her mother, Rebecca Bechtel. The Commonwealth offered this testimony to corroborate the victim's testimony as to the alleged sexual assaults. Samuel Ray testified on direct examination that the victim told him that Appellant had molested her. Appellant's trial counsel did not request an offer of proof as to Samuel's testimony, did not object to the testimony, and did not request an instruction to the jury as to the requirement that the hearsay statements offered by Samuel could not be considered as substantive evidence. Appellant asserts that trial counsel's failures constitute ineffective counsel and entitle him to relief.

To prevail on a claim of ineffectiveness of counsel, petitioner must show that (1) the underlying claim has merit, (2) counsel's conduct was without a reasonable basis designed to effectuate the petitioner's best interest, and (3) petitioner was prejudiced by this ineffectiveness. ***Commonwealth v. Bracey***, 568 Pa. 264, 795 A.2d 935 (2001), ***Commonwealth v. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999). To satisfy the third prong, petitioner must show that, but for counsel's act or omission, the outcome of proceeding would have been different. The court presumes that counsel was effective unless petitioner proves otherwise. ***Commonwealth v. Rollins***, 558 Pa. 532, 738 A.2d 435 (1999).

Hearsay evidence is commonly defined as an out-of-court assertion offered to prove the truth of the matter asserted. ***Commonwealth v. Laich***, 566 Pa. 19, 777 A.2d 1057 (2001). Such statements may be offered, however, to rehabilitate a witness whose credibility has been attacked with a charge of recent fabrication or faulty memory.

Pa.R.E. 613(c), ***and see Commonwealth v. Counterman***, 553 Pa. 370, 405, 719 A.2d 284, 301 (1998). Therefore, when a witness's credibility is called into question by defense counsel, the Commonwealth may rehabilitate the witness by presentation of a prior consistent statement in their case in chief or on rebuttal. ***Id.***

In the present case, the victim was crossed [sic] examined regarding her ability to recall events and prior statements she made to police and prosecutors, as well as her testimony at the preliminary hearing. Defense counsel elicited testimony from the victim where she admitted she cold not recall certain details related to the incidents. For example, she was unable to recall what vehicle Appellant was driving during the initial molestation. She was also unable to remember the date that sexual intercourse took place. Additionally, her direct testimony was impeached with her testimony from the preliminary hearing, as well as statements to the police, the prosecution and her mother.

In addition to attacks on her faulty memory, Appellant's counsel also insinuated that the charges were fabricated. Counsel questioned the victim as to why the written statements to police appeared in her mother's handwriting, specifically asking if her mother selected what information to include or omit. Counsel also suggested that the victim was angry with her father because he previously punished her. Implying that the victim fabricated the story is sufficient to allow the admission of a prior consistent statement to rehabilitate. ***Counterman***, 553 Pa. at 405, 719 A.2d at 301. Therefore, the trial court properly permitted Samuel Ray and Rebecca Bechtel to testify regarding prior consistent statements the victim made to them to rehabilitate her testimony.

Appellant's trial counsel did not object to the testimony of the two witnesses and did not file a motion *in limine* to preclude their testimony. Counsel is not required, however, to make meritless objections. ***See Commonwealth v. Beasley***, 544 Pa. 554, 678 A.2d 773 (1996). Because the testimony was properly admitted, Appellant's claim that counsel should have objected is without merit. Therefore, Appellant is entitled to no relief.

Appellant also challenges trial counsel's effectiveness for failing to request a jury instruction limiting the prior consistent statement solely to rehabilitative purposes. This court has opined that a trial court *should* give a limiting instruction regarding the consideration of prior consistent statements if requested to do so. ***Commonwealth v. Gore***, 396 A.2d 1302, 1307 (Pa. Super. 1978). Appellant asks that we interpret ***Gore*** to stand for the proposition that a trial court *must* give a limiting instruction. We decline to do so. Because there is no requirement, Appellant is unable to show that trial counsel's failure to request a limiting instruction changed the outcome of the trial. Had a limiting instruction been requested, there is no guarantee that the trial court would have granted the request. Accordingly, Appellant fails to demonstrate that the outcome of the trial would have differed but for his counsel's alleged ineffectiveness. The PCRA court properly denied relief.

Finally, Appellant argues that prior Appellate counsel was ineffective in failing to raise the above issues on direct appeal. Since we have determined these issues are meritless, the trial court properly held that prior appellate counsel was not ineffective for choosing not to raise them.

Accordingly, Appellant is entitled to no relief and we affirm the order dismissing his petition.

Order affirmed.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: JUL – 1 2003

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF |
| vs. | : | BERKS COUNTY, PENNSYLVANIA |
| RONALD LEE RAY | : | CRIMINAL DIVISION |
| | : | NO. 2845/98 |
| | : | JUDGE JEFFREY L. SCHMEHL |

**MEMORANDUM OPINION,**
**SCHMEHL, J.L., JUDGE, [/s/ JLS] October 7, 2002**

On May 12, 1999, following a jury trial, the Defendant was found guilty of Incest, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, and Indecent Assault. On June 28. 1999, the Defendant was sentenced to six (6) years to fifteen (15) years incarceration on Count nine (9), Involuntary Deviate Sexual Intercourse, and sixteen (16) months to five (5) years incarceration on Counts seven (7) and eight (8), Incest and Statutory Sexual Assault, consecutively. During all of the above stated proceedings, Lawrence Hracho, Esquire, represented the Defendant.

On July 27, 1999, the Defendant filed a Notice of Appeal to the Superior Court. On December 12, 2000, the Superior Court affirmed the judgment of sentence. The Defendant filed a Petition for Allowance of Appeal Nunc Pro Tunc to the Pennsylvania Supreme Court. On March 19, 2001, the Pennsylvania Supreme Court denied Defendant's Petition. Harold Kane, Esquire, represented defendant on direct appeal.

The Defendant filed the instant petition for Post Conviction Relief on January 8, 2002. Paul A. Bauer,

Esquire represented the Defendant in this phase of his Post Conviction Relief Act Proceedings. On April 29, 2002, this Court issued an Order and Notice of Intent to Dismiss the Defendant's PCRA. On May 8, 2002, the Defense counsel wrote a letter to the Court, raising additional issues. On May 24, 2002, this Court dismissed the Defendant's PCRA.

On July [sic] 5, 2002, Paul A Bauer, III, Esquire, filed a Petition to Withdraw as Counsel. On June 13, 2002, the Court granted this Motion. On June 20, 2002, the Defendant, by way of new counsel, John J. Waldron, Esquire, filed a Notice of Appeal, appealing from the Order entered on April 29, 2002. An Amended Notice of Appeal was filed on June 26, 2002.

Pursuant to Rule 1925 (a) of the Pennsylvania Rules of Appellate Procedure and an Order of this Court, Defendant filed a Concise Statement of Matters Complained of on Appeal. These are, in abridged form, as follows:

1. The Defendant was denied effective assistance of council because trial counsel failed to meet with and produce character witnesses.

2. The Defendant was denied effective assistance of counsel because trial counsel failed to ask for an offer of proof for the testimony of Samuel Ray.

3. The Defendant was denied effective assistance of counsel because trial counsel failed to file a motion in limine to preclude the testimony of Samuel Ray.

4. The Defendant was denied effective assistance of counsel because trial counsel failed to ask for an offer of proof for the testimony of Rebecca Bechtel.

5. The Defendant was denied effective assistance of counsel because trial counsel failed to file a motion in limine to preclude the testimony of Rebecca Bechtel.

6. The Defendant was denied effective assistance of counsel because appellate counsel failed to raise the above issues.

This Opinion is written pursuant to Rule 1925 (a) of the Pennsylvania Rules of Appellate Procedure and for the following reasons, this Court requests that this instant appeal be denied.

## THE TRIAL COURT DID NOT ERR IN DISMISSING DEFENDANT'S PETITION UNDER THE POST CONVICTION RELIEF ACT

To demonstrate eligibility for relief under the Post Conviction Relief Act, a petitioner must essentially prove four elements to the court, all by a preponderance of the evidence of the evidence. First, he has the relatively simple burden of establishing that he has been either (1) convicted of a crime in this Commonwealth and is currently serving time (imprisonment, probation, parole) for that crime, (2) is awaiting execution for that crime or, alternatively, (3) is serving a sentence to which the disputed conviction/sentence will run consecutively.[1] Second, petitioner must prove that his conviction or sentence was in err because of one of the following:[2]

---

[1] 42 Pa.C.S.A. § 9543(a)(1)(I)-(iii).

[2] 42 Pa.C.S.A. § 9543(a)(2)(I)-(viii).

(1) an unconstitutional proceeding;

(2) ineffective assistance of counsel;

(3) an unlawfully induced guilty plea;

(4) an appeal was obstructed by government officials;

(5) new found exculpatory evidence exists;

(6) an unlawful sentence was rendered; or

(7) the convicting/sentencing court had no jurisdiction to act as it did.

To be eligible for PCRA relief on an ineffective assistance of counsel claim, a petitioner must plead and prove that the conviction resulted from ineffective assistance of counsel which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. *Commonwealth v. Legg*, 447 Pa.Super. 362, 669 A.2d 389 (1995). In order to establish such a claim the petitioner must show: "(1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999).

Defendant's first claim of relief is that his trial counsel was ineffective for failing to meet with and produce character witnesses. This Court addressed this issue in its Order and Notice of Intent to Dismiss. There, we noted that Section 9544 of Title 42 provides as follows:

§ 9544. Previous litigation and waiver

(a) Previous litigation. – For purposes of this subchapter, an issue has been previously litigated if:

> (1) Deleted.
>
> (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or
>
> (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.
>
> (b) Issues waived. – For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.

42 Pa.C.S.A. § 9544.

The Defendant's claim regarding character witnesses has been previously litigated in the Defendant's direct appeal. In disposing of this claim, the Superior Court stated that a review of the record revealed that not only the Defendant's counsel, but also the Defendant himself, made a conscious decision not to introduce character witness. *See Commonwealth v. Ray*, 1208 MDA 1999 at 4. Specifically, the Superior Court stated:

> At trial when the Commonwealth learned that the defendant was not planning to offer any character testimony it asked the court to conduct a "colloquy" of the defendant to ensure that he understood his right to present such testimony. Therein Appellant was questioned on the record by his own counsel about whether they had discussed character witnesses. Appellant indicated that he understood what a character witness could and could not testify to and that he understood it was his counsel's advice not to call any character witnesses . . .

> Thus, from the record before us we are satisfied that Appellant made a conscious decision not to introduce character evidence. It cannot be said that counsel was ineffective for failing to present such testimony where the record reveals that Appellant concurred in this decision after being explained the full extent of his rights.

*Commonwealth v. Ray*, 1208 MDA 1999 at 4-5.

Accordingly, the Defendant's claim that his trial counsel was ineffective for not calling character witnesses to the stand has no merit. Furthermore, in accordance with 42 Pa.C.S.A. § 9544, this claim is not cognizable under the PCRA as it previously has been litigated.

With regard to the present claim that trial counsel mishandled Samuel Ray's testimony, we noted that at trial, the Commonwealth called Samuel Ray, the Defendant's son and the victim's sister, to the stand. Samuel Ray testified that his sister told him that the Defendant had molested her. (N.T. 5/12/99 p. 135). He promised his sister that he wouldn't tell anybody. *Id.* at 136. He nevertheless told his pastor. *Id.* This testimony corroborated the victim's version of events. (*See generally N.T.* 5/12/99 pp. 27-129).

In his PCRA petition, the Defendant alleged that trial counsel was ineffective for not asking for an offer of proof for testimony prior to the testimony of Samuel Ray, for not filing a Motion in Limine to preclude this testimony, and for not asking for an instruction for the jury to disregard his testimony. The Defendant argues that the testimony was inadmissible heresay designed to buttress the credibility of the victim.

"Hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. *Commonwealth v. Robinson*, 781 A.2d 152, 162. (Pa.Super. 2001). Hearsay is inadmissible unless an exception applies. *Id.* "The reason that hearsay is subject to exclusion is related to the fact that the declarant is not in court, and the safeguards of cross-examination afforded by the Sixth Amendment to the United States Constitution (to face one's accusers) are rendered nugatory." *Commonwealth v. Hamilton*, 376 Pa.Super. 404, 409, 546 A.2d 90, 93 (1988).

In the instant case, the victim testified and was cross-examined by the Defendant's trial counsel. In fact, the Defendant's trial counsel specifically cross-examined the victim with regard to the conversation she had with her brother:

Q. So you weren't that upset that Sam said, look, come out with me you're going to go for a drive and cool down?

A. Well, I was crying. And he said let's go for a ride, you know.

Q. And then on this drive you say, by the way Sam, my dad molested me?

A. No, he was asking me what was wrong with me, why I was acting like this.

Q. Why you were the way you were?

A. And I told him.

Q. And you said the reason is my dad molested me, right?

A. Yes.

(N.T. 5/12/99 p. 97).

In accordance with *Commonwealth v. Hamilton*, *supra*, the declarant was present in court and was available for cross-examination. Moreover, the Superior Court set forth the following standard in *Commonwealth v. Swinson*, 626 A.2d 627 (Pa.Super. 1993):

> It is well-established in this Commonwealth that prior consistent statements are hearsay when offered for the truth of their assertions. *Commonwealth v. Wood*, 417 Pa.Super. 264, 268-269, 612 A.2d 474, 476 (19923) [sic]. "Such statement may be offered, however, to rehabilitate a witness whose credibility has been attacked with a charge of recent fabrication or faulty memory." *Wood*, 417 Pa.Super. at 269, 612 A.2d at 476.

*Commonwealth v. Swinson*, *supra*, 626 A.2d at 632-633. *See also*: Pa.R.E. 613 (C)(2).[3]

Application of the legal analysis in the above-cited cases to the facts of this case compels the conclusion that the statement given to Samuel Ray by his sister, the victim, was admissible as a prior consistent statement offered to rehabilitate the witness whose credibility was impeached by a charge of faulty memory and recent fabrication. During cross-examination, defense counsel attempted to cast doubt on the victim's memory. Specifically, defense counsel questioned the victim about her

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[3] "Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given a chance to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of (1)fabrication, bias, improper influence, or faulty memory and the statement was made before that which had been charged existed or arose." Pa.R.E. 613 (c)(1).

memory of athletic activities she engaged in which were in [sic] close in time to the sexual assault. Defense counsel also implied that the victim's mother unduly influenced her to lie to the police. (N.T. 5/12/1999 p. 76). Moreover, the Defendant's counsel specifically questioned the Defendant's memory of one of the sexually assaultive acts:

> Q: It happened in the trailer?
>
> A: Yes.
>
> Q: Okay. Is it fair to say that it did not happen on New Years Day 1996?
>
> A: I don't think it did.
>
> Q: You don't think it did?
>
> A: I don't remember, sir.
>
> Q: Looking back to the preliminary hearing, page 14, Mrs. Daringer asked you back then this is about the New Year's Day 1996, New Year's Eve '95, New Year's Day '96, did you have intercourse, you said no. Do you remember saying that?

(N.T. 5/12/1999 pp. 81-82)

Accordingly, as defense counsel raised an inference that the victim's memory was faulty, the testimony of the victim's brother concerning hearsay statements made by the victim to him was properly admitted as a prior consistent statement. As such, the Defendant's trial counsel was not ineffective for not asking for an offer of proof for testimony prior to the testimony of Samuel Ray, for not filing a Motion in Limine to preclude this testimony, and for not asking for an instruction for the jury to disregard his testimony.

As for Defendant's argument regarding the testimony of Rebecca Bechtel, this is simply a restatement of Defendant's hearsay claim of Samuel Ray. We have already addressed this argument. Finally, appellate counsel was not ineffective for not raising any of the above listed claims of trial counsel's ineffectiveness since there is no evidence that trial counsel was at all ineffective. Accordingly, the instant appeal should be denied.

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION |
| vs. | : | |
| RONALD LEE RAY | : | NO. 2845-98 |
| | : | JUDGE JEFFREY L. SCHMEHL |

**ORDER**

(Filed May 29, 2002)

**AND NOW**, this 24th day of May, 2002, the Defendant having failed to meritoriously respond to this Court's Order and Notice of Intent to Dismiss, dated April 29, 2002, pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. §9541, *et seq.*, it is hereby **ORDERED AND DECREED** that said petition is **DISMISSED**.

On May 8, 2002, Paul A. Bauer, III, Esquire, the attorney for the Defendant, wrote a letter to this Court in response to the Court's Order and Notice of Intention to Dismiss. In this letter, the defense has asserted the following: 1) the Defendant is entitled to an evidentiary hearing because there is a material factual controversy regarding the failure of Defendant's trial counsel to call character witnesses; 2) the defense requests that the Court review the Defendant's Pro Se Supplemental PCRA petition; and 3) the defense asserts that the testimony of Samuel Ray and Betty Fox constituted "impermissible buttressing" of the victim's credibility.

This Court does not believe that there is a material factual controversy regarding the failure of Defendant's trial counsel to call character witnesses. We believe that we have already addressed this argument in the Order

and Notice of Intent to Dismiss. However the defense presently claims that this Court has overlooked the fact that the Defendant's trial counsel, Lawrence Hracho, Esquire, mistakenly informed the Court that no names were provided by the Defendant that would serve as character witnesses and later corrected himself by later stating the names of two possible character witnesses.

In further support of this argument, the Defendant relies on *Commonwealth v. Williams*, 732 A.2d 1167 (1999). In *Williams*, a defendant filed a petition for postconviction relief following his conviction of first-degree murder. The Supreme Court of Pennsylvania remanded the case because of PCRA court did not make an independent credibility determination with respect to a claim based on recantation testimony *Williams* at 1180-1181. The Court also remanded the case because the lower court adopted the Commonwealth's reasons, which the Supreme Court deemed to be insufficient on their face. *Id.*

Unlike the facts in *Williams*, there is no claim by the Defendant that any of the witnesses in the instant case recanted their testimony. Furthermore, the Defendant's case does not involve independent credibility determinations with respect to claims based on recantation testimony. Finally, *Williams* reiterates the principle that a PCRA petitioner is precluded from raising a claim that was previously and finally litigated on direct appeal. *Id.* at 1183. Accordingly, the Defendant's reliance on *Williams* is misplaced. The fact that Defendant's trial counsel did not readily know the names of two potential character witnesses is not a sufficient reason to merit an evidentiary hearing. This matter was raised both at trial and addressed during the initial appeal.

As for defense counsel's request that this Court review the Defendant's Pro Se Supplemental PCRA petition, this Court declines to do so. *See Commonwealth v. Ellis*, 534 Pa. 176, 626 A.2d 1137, 1139, 1141 (1993) (providing that there is no constitutional right to hybrid representation at trial or on appeal and courts are not required to consider pro se filings or briefs where a defendant is represented by counsel on appeal).

Finally, although Defendant concedes that the testimony of Samuel Ray and Betty Fox did not contain inadmissible hearsay, the Defendant nonetheless requests that the Court address the issue of whether their testimony constituted "impermissible buttressing of the testimony of the victim." The Defendant has pointed to no authority in support of this argument. Moreover, this Court has been unable to uncover any caselaw in support therein.

Defendant is hereby notified that he has the right to appeal this Order to the Superior Court of Pennsylvania. An appeal must be taken within thirty (30) days from the date of this Order.

**BY THE COURT:**

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION |
| vs. | : | |
| RONALD LEE RAY | : | NO. 2845-98 |
| | : | JUDGE JEFFREY L. SCHMEHL |

**ORDER AND NOTICE OF INTENT TO DISMISS**

AND NOW, this 29th day of April, 2002, notice is hereby given by the undersigned, the Honorable Jeffrey L. Schmehl, of his intent to dismiss the Defendant's Petition for Post-Conviction Relief pursuant to 42 Pa.C.S.A. Section 9543. Defendant filed his petition for Post Conviction Relief on January 8, 2002.

On May 12, 1999, following a jury trial, the Defendant was found guilty of Incest, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, and Indecent Assault. On June 28, 1999, the Defendant was sentenced to six (6) years to fifteen (15) years incarceration on Count nine (9), Involuntary Deviate Sexual Intercourse, and sixteen (16) months to five (5) years incarceration on Counts seven (7) and eight (8), Incest and Statutory Sexual Assault, consecutively. During all of the above stated proceedings, Lawrence Hracho, Esquire, represented the Defendant.

On July 27, 1999, the Defendant filed a Notice of Appeal to the Superior Court. On December 12, 2000, the Superior Court affirmed the judgment of sentence. The Defendant filed a Petition for Allowance of Appeal Nunc Pro Tunc to the Pennsylvania Supreme Court. On March

19, 2001, the Pennsylvania Supreme Court denied Defendant's Petition. Harold Kane, Esquire, represented defendant on direct appeal.

The Defendant filed the instant petition for Post Conviction Relief on January 8, 2002. Paul A. Bauer, Esquire is representing the Defendant in his Post Conviction Relief Act proceedings.

In his PCRA petition, the Defendant alleges that he was denied effective assistance of ***trial counsel*** for: (1) failure to meet with and interview character witnesses, (2) failure to ask for an offer of proof for testimony prior to the testimony of Samuel Ray, (3) failure to file a Motion in Limine to preclude the testimony of Samuel Ray or failure to ask for an instruction for the jury to disregard Samuel Ray's testimony, (4) failure to ask for an offer of proof prior to the testimony of Rebecca Bechtel, (5) failure to file a Motion in Limine to preclude the testimony of Rebecca Bechtel or failure to ask for an instruction for the jury to disregard Rebecca Bechtel's testimony, and (6) eliciting testimony concerning "prior uncharged bad acts" of the defendant.

In his PCRA petition, the Defendant alleges that he was denied the effective assistance of ***appellate counsel*** for: (1) failure to raise the above issues on appeal, (2) failure to meet with Defendant prior to filing the direct appeal, (3) subcontracting the appellate work to an attorney who was never hired by the Defendant, (4) failure to consult with Defendant regarding the outcome of the Superior Court appeal, resulting in appellate counsel's failure to timely file a Petition for Allowance of Appeal to the Supreme Court, and (5) raising the issue of trial

counsel's ineffectiveness on direct appeal without the benefit of a post trial motion transcript.

To demonstrate eligibility for relief under the Post Conviction Relief Act, a petitioner must essentially prove four elements to the court, all by a preponderance of the evidence. First, he has the relatively simple burden of establishing that he has been either (1) convicted of a crime in this Commonwealth and is currently serving time (imprisonment, probation, parole) for that crime, (2) is awaiting execution for that crime or, alternatively, (3) is serving a sentence to which the disputed conviction/sentence will run consecutively.[1] Second, petitioner must prove that his conviction or sentence was in err because of one of the following:[2]

(1) an unconstitutional proceeding;

(2) ineffective assistance of counsel;

(3) an unlawfully induced guilty plea;

(4) an appeal was obstructed by government officials;

(5) new found exculpatory evidence exists;

(6) an unlawful sentence was rendered; or

(7) the convicting/sentencing court had no jurisdiction to act as it did.

To be eligible for PCRA relief on an ineffective assistance of counsel claim, a petitioner must plead and prove that the conviction resulted from ineffective assistance of

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[1] 42 Pa.C.S.A. § 9543(a)(1)(I)-(iii).

[2] 42 Pa.C.S.A. § 9543(a)(2)(I)-(viii)

counsel which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. *Commonwealth v. Legg*, 447 Pa.Super. 362, 669 A.2d 389 (1995). In order to establish such a claim the petitioner must show: "(1) that the claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999).

**Ineffectiveness of Trial Counsel**

a. Failure To Meet With and Interview Character Witnesses

Section 9544 of Title 42 provides as follows:

§ 9544. Previous litigation and waiver

(a) Previous litigation. – For purposes of this subchapter, an issue has been previously litigated if:

(1) Deleted.

(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or

(3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

(b) Issues waived. – For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before

> trial, at trial, during ...nitary review, on appeal or in a prior state postconviction proceeding.

42 Pa.C.S.A. §9544.

The Defendant's claim regarding character witnesses has been previously litigated in the Defendant's direct appeal. In disposing of this claim, the Superior Court stated that a review of the record revealed that not only the Defendant's counsel, but also the Defendant himself, made a conscious decision not to introduce character witness [sic]. *See Commonwealth v. Ray*, 1208 MDA 1999 at 4. Specifically, the Superior Court stated:

> At trial when the Commonwealth learned that the defendant was not planning to offer any character testimony it asked the court to conduct a "colloquy" of the defendant to ensure that he understood his right to present such testimony. Therein Appellant was questioned on the record by his own counsel about whether they had discussed character witnesses. Appellant indicated that he understood what a character witness could and could not testify to and that he understood it was his counsel's advice not to call any character witnesses . . .
>
> Thus, from the record before us we are satisfied that Appellant made a conscious decision not to introduce character evidence. It cannot be said that counsel was ineffective for failing to present such testimony where the record reveals that Appellant concurred in this decision after being explained the full extent of his rights.

*Commonwealth v. Ray*, 1208 MDA 1999 at 4-5.

Accordingly, the Defendant's claim that his trial counsel was ineffective for not calling character witnesses

to the stand has no merit. Furthermore, in accordance with 42 Pa.C.S.A. §9544, this claim is not cognizable under the PCRA as it previously has been litigated.

b. Samuel Ray's Testimony

At trial, the Commonwealth called Samuel Ray, the Defendant's son and the victim's sister, to the stand. Samuel Ray testified that his sister told him that the Defendant had molested her. (N.T. 5/12/99 p. 135). He promised his sister that he wouldn't tell anybody. *Id.* at 136. He nevertheless told his pastor. *Id.* This testimony corroborated the victim's version of events. (*See generally* N.T. 5/12/99 pp. 27-129).

In his PCRA petition, the Defendant alleges that trial counsel was ineffective for not asking for an offer of proof for testimony prior to the testimony of Samuel Ray, for not filing a Motion in Limine to preclude this testimony, and for not asking for an instruction for the jury to disregard his testimony. The Defendant argues that the testimony was inadmissible hearsay designed to buttress the credibility of the victim.

"Hearsay" is defined as an out-of-court statement offered to prove the truth of the matter asserted. *Commonwealth v. Robinson*, 781 A.2d 152, 162. (Pa.Super. 2001). Hearsay is inadmissible unless an exception applies. *Id.* "The reason that hearsay is subject to exclusion is related to the fact that the declarant is not in court, and the safeguards of cross-examination afforded by the Sixth Amendment to the United States Constitution (to face one's accusers) are rendered nugatory." *Commonwealth v. Hamilton*, 376 Pa.Super. 404, 409, 546 A.2d 90, 93 (1988). When the declarant is present in court and available for

cross-examination, testimony regarding prior statements made by the declarant is admissible. *Id.*

In the instant case, the victim testified and was cross-examined by the Defendant's trial counsel. In fact, the Defendant's trial counsel specifically cross-examined the victim with regard to the conversation she had with her brother:

> Q. So you weren't that upset that Sam said, look, come out with me you're going to go for a drive and cool down?
>
> A. Well, I was crying. And he said let's go for a ride, you know.
>
> Q. And then on this drive you say, by the way Sam, my dad brother molested me?
>
> A. No, he was asking me what was wrong with me, why I was acting like this.
>
> Q. Why you were the way you were?
>
> A. And I told him.
>
> Q. And you said the reason is my dad molested me, right?
>
> A. Yes.

(N.T. 5/12/99 p. 97).

In accordance with *Commonwealth v. Hamilton*, *supra*, the declarant was present in court and was available for cross-examination. As such, the statements made by the victim's brother were admissible and the Defendant's trial counsel was not ineffective for not asking for an offer of proof for testimony prior to the testimony of Samuel Ray, for not filing a Motion in Limine to preclude

this testimony, and for not asking for an instruction for the jury to disregard his testimony.

c. Rebecca Bechtel's Testimony

Defendant's argument regarding the testimony of Rebecca Bechtel is simply a restatement of Defendant's hearsay claim of Samuel Ray. We have already addressed this argument.

d. Testimony Concerning "prior uncharged bad acts" of the Defendant

Next, the Defendant claims that he was denied effective assistance of counsel because during cross-examination of the victim, he elicited testimony concerning "prior uncharged bad acts" of the Defendant. It is difficult for this Court to address this claim because the Defendant has referenced neither a specific uncharged bad act nor a page number from the trial transcript. Notwithstanding this lack of specificity, a review of the trial transcript reveals the following dialogue took place between defense counsel and the victim, regarding the Defendant attempting a sexual assault of the victim in Baltimore:

> Q. Was there ever any time, except for this thing where the truck, whatever kind of truck it may have been, and your dad's trailer, was there any other sexual activity of any kind between yourself and he, any other place, any other time.
>
> A. No.
>
> Q. Never?

A. No.

Q. That you're certain of, correct?

A. Hum, I'm sorry what did you say?

Q. That you're certain of?

A. I didn't –

Q. You're certain of that, right?

A. Pretty –

Q. Pretty much so

A. Yeah. Other than Baltimore but –

Q. A, Baltimore?

A. Oh, I didn't think.

Q. Didn't think of Baltimore?

A. No, I thought of Baltimore, I just –

Q. I'm sorry?

A. I thought of Baltimore, I didn't think I was supposed to say anything about it. Sorry.

Q. Remember me asking you back at the same hearing [*i.e.*, the preliminary hearing] that question, page 26, did anything happen sexually between your father and yourself at any other time, at any other place. Remember me asking you that?

A. No, I don't. Sorry.

Q. Okay. Page 26, this page her, (indicating) okay.

A. (The witness read the transcript.) Okay.

Q. Okay. Do you remember me asking you that then?

A. Yeah.

Q. And what did you say?

A. Um, –

Q. Not that I know of, right?

A. Right. I didn't think Baltimore was really important because nothing happened.

Q. Oh, did anything sexually happen in Baltimore?

A. No.

Q. Didn't you tell somebody that your dad tried to molest you in Baltimore?

A. He wanted to but I, like, I pretty much freaked out on him.

(N.T.5/12/99 pp.84-86).

In order to prevail on a claim of ineffective assistance of counsel, the Defendant must show that trial counsel had no reasonable basis or strategy for the particular course chosen. *Commonwealth v. Birdsong*, 538 Pa. 587, 595, 650 A.2d 26, 30 (1994). "[T]he mere allegation that trial counsel pursued the wrong course of action will not make out a finding of ineffectiveness." *Id.* The mere eliciting of testimony that a defendant has engaged in a "prior uncharged bad act" does not necessitate a finding of ineffectiveness where trial counsel had a reasonable trial strategy for doing so. *See Id.* at 600-601, 650 A.2d at 33.

Clearly, defense counsel was attempting to impeach the witness by showing that there was a conflict between

her trial testimony and her testimony at the preliminary hearing. Trial counsel was faced with the dilemma of whether to allow the jury to hear about the Defendant's alleged prior attempted sexual assault in order to show this inconsistency. The disclosure of this prior bad act was a reasonable trial strategy, and thus, trial counsel was not ineffective for doing so.

**Ineffectiveness of Appellate Counsel**

a. Failure To Raise the Above Issues on Appeal

Since all of the above issues are meritless, appellate counsel was not ineffective for choosing not to raise them.

b. Defendant's Generalized Claims of Appellate Error

Finally, the Defendant argues that he was denied the effective assistance of appellate counsel for (1) failure to meet with Defendant prior to filing the direct appeal, (2) subcontracting the appellate work to an attorney who was never hired by the Defendant, (3) failure to consult with Defendant regarding the outcome of the Superior Court appeal, resulting in appellate counsel's failure to timely file a Petition for Allowance of Appeal to the Supreme Court, and (4) raising the issue of trial counsel's ineffectiveness on direct appeal without the benefit of a post trial motion transcript.

The Pennsylvania Supreme Court has recently declined to recognize any generalized cumulation of errors doctrine because "it is axiomatic that 'no quantity of meritless issues can aggregate to form a denial of due process.'" *Commonwealth v. Simmons*, 786 A.2d 943 (Pa. 2001). *Commonwealth v. Rollins*, 558 Pa. 532, 562, 738

A.2d 435, 452 (1999) (*quoting Commonwealth v. Travaglia*, 541 Pa. 108, 139, 661 A.2d 352, 367 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996)).

With exception of appellate counsel's failure to timely file a Petition for Allowance of Appeal to the Supreme Court, this Court does not believe that any of the other alleged "errors" of appellate advocacy are substantive issues which so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. *See generally Commonwealth v. Legg*, *supra*. Instead, they are attempts to establish "layering" of ineffectiveness claims of errors in procedure to avoid the issues being deemed waived. *See Simmons*, *supra*, at 958; *citing Commonwealth v. Marrero*, 561 Pa. 100, 748 A.2d 202, 203-04 n. 1 (2000) (layering of ineffectiveness claims). Accordingly, these claims of error are not cognizable under the PCRA.

As for Defendant's claim that appellate counsel's failure to timely file a petition for Allowance of Appeal to the Supreme Court rendered him ineffective assistance of appellate counsel, the Superior Court has recently held that such a claim has merit where trial counsel fails to file a direct appeal to the Superior Court. *See Commonwealth v. Qualls*, 758 A.2d 1007 (Pa.Super. 2001). However, there is no support in case law for the proposition that after pursuing a direct appeal to the Superior Court, counsel must file a petition for Allowance of Appeal to the Supreme Court.

The Defendant shall have twenty (20) days from the date of this notice to respond to the proposed dismissal. If no response is received by this Court within the time period allowed, an Order dismissing the Petition for Post

Conviction Collateral Relief will be filed with the clerk of courts.

**BY THE COURT:**

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Appellee | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| RONALD LEE RAY Appellant | : | No. 1208 MDA 1999 |

Appeal from the Judgment of Sentence entered June 28, 1999 in the Court of Common Pleas of Berks County, Criminal, at No. 2845-98.

BEFORE: DEL SOLE, ORIE MELVIN and MONTEMURO*, JJ.

MEMORANDUM: (FILED DEC. 12, 2000)

This is an appeal from the judgment of sentence imposed after a jury found Appellant guilty of Incest, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault and Indecent Assault. Appellant, with new counsel, takes this direct appeal raising numerous issues including ineffective assistance of trial counsel.

Initially, Appellant asserts there was insufficient evidence as a matter of law to prove his guilt of the crimes charged. Specifically, Appellant argues that because the prosecution withdrew the crimes occurring prior to May 1995, there is not sufficient evidence that any crime occurred after May 1995.

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* Retired Justice assigned to the Superior Court.

In reviewing a sufficiency of the evidence claim, we view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth. ***Commonwealth v. Rose***, 344 A.2d 824 (Pa. 1975). A mere conflict in the testimony does not render the evidence insufficient, ***Commonwealth v. Verdekal***, 506 A.2d 415 (Pa. Super. 1986), because it is within the province of the fact finder to determine the weight to be given to the testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Whitfield***, 380 A.2d 362 (Pa. 1977).

In this case the victim testified that about one month after she moved into Appellant's home in February of 1994, he began assaulting her. She testified that he would disrobe and have her stroke his penis. Appellant would then put his hands on the back of her head, and place his penis in her mouth until he ejaculated. He also would "put his finger in [her] vagina and fondle [her] breasts." N.T., 5/12/99, at 46. During this time the victim was about 13 years old. She testified that this practice of abuse continued regularly until the time she moved out of her father's home, which was in August of 1995. ***Id***. at 48-49 and 152. There was testimony from the victim regarding an assault by Appellant which occurred on New Year's Day 1996. She recounted that Appellant took off his clothes in front of her while she watched T.V., exposed his penis to her, touched her breasts and vagina and made her "suck his penis." ***Id***. at 51.

Although during cross-examination Appellant attempted to question the victim about inconsistencies in her statements, the evidence offered by the Commonwealth was clearly sufficient to support the jury's verdict

of guilt. Further, there was ample evidence offered concerning the relevant time period to support these convictions.

Appellant also raises numerous claims of ineffective assistance of counsel. In reviewing these issues we remain mindful that trial counsel is presumed to be effective and Appellant has the burden of proving otherwise. ***Commonwealth v. Williams***, 570 A.2d 75, 81 (Pa. 1990). In reviewing ineffectiveness claims, we must first determine whether the issue underlying the charge of ineffectiveness is of arguable merit. ***Commonwealth v. Sherard***, 394 A.2d 971 (Pa. 1978). If not, we need look no further since counsel will not be deemed ineffective for failing to pursue a meritless issue. ***Commonwealth v. Lennox***, 378 A.2d 462 (Pa. Super. 1977). If there is arguable merit to the claim, we will then look to see whether the course chosen by counsel had some reasonable basis aimed at promoting the client's interests. ***Commonwealth v. Evans***, 413 A.2d 1025 (Pa. 1980). Further, there must be a showing that counsel's ineffectiveness prejudiced Appellant's case. ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987). The burden of producing the requisite proof lies with Appellant. ***Commonwealth v. Hentosh***, 554 A.2d 20 (Pa. 1989).

Appellant first challenges counsel's ineffectiveness for his failure to present character witnesses to testify on Appellant's behalf at trial. It is true that where only two direct witnesses are involved, our courts have found character evidence critical to a determination of credibility. ***Commonwealth v. Weiss***, 606 A.2d 439 (Pa. 1992). ***See also***, ***Commonwealth v. Scot***, 436 A.2d 607 (Pa. 1981) (finding evidence of the defendant's good character, despite the strength of the Commonwealth's case, may be

sufficient to create a reasonable doubt.) However, in this case the record makes clear that Appellant was advised of his right to present these witnesses and chose to forgo that right.

At trial when the Commonwealth learned that the defendant was not planing [sic] to offer any character testimony it asked the court to conduct a "colloquy" of the defendant to ensure that he understood his right to present such testimony. Therein Appellant was questioned on the record by his own counsel about whether they had discussed character witnesses. Appellant indicated that he understood what a character witness could and could not testify to and that he understood it was his counsel's advice not to call any character witnesses. Appellant stated that he understood counsel's position and had no objection to the decision not to call character witnesses. Appellant was also questioned by the Commonwealth and was advised that "in a case like this when it's a he said/she said in sexual assault cases, where there is – you know, crimes like this aren't committed in front [of] an audience, . . . character evidence is enough to sway a jury. . . . " N.T., 5/12/99, at 305. Appellant reiterated his desire to abide by the decision not to call character witnesses. The court then indicated that although Appellant did not have any character witnesses readily available, if there could be some available it was willing to continue the case.

Thus, from the record before us we are satisfied that Appellant made a conscious decision not to introduce character evidence. It cannot be said that counsel was ineffective for failing to present such testimony where the record reveals that Appellant concurred in this decision after being explained the full extent of his rights.

Appellant also claims counsel was ineffective for failing to challenge the credibility of the victim with regard to her knowledge of sexual activity and terminology. Appellant contends that evidence of the victim's past sexual history was relevant to her credibility and her knowledge of sexual terminology. He acknowledges that the Rape Shield Statute, 18 Pa.C.S.A. § 3104, prevents a defendant from introducing evidence of a complainant's past sexual history when it has no relevance, but claims that Commonwealth "opened the door" when it elicited testimony revealing that the victim has had four sexual partners.

During the direct examination of the victim she did testify that after the age of 15 (after the relevant time period involving these assaults) she became sexually active and had four boyfriends with whom she had sexual relations up until the time of trial. At the time of trial the victim was 18 years old and was testifying regarding events which happened years earlier. We fail to see the relevance in questioning the victim about her knowledge of sexual terminology when she herself admitted to having sexual relations with others in the intervening years. Accordingly, this claim is without merit.

Appellant raises ineffective assistance of counsel claims regarding his counsel's actions in relation to the jury charge. Appellant claims counsel failed to present a proposed jury instruction on reasonable doubt and failed to object to the instruction given by the court. Appellant specifically points to the word "restrain" used by the court in its definition. The relevant sentence reads: "A reasonable doubt is the kind of doubt that would *restrain* a reasonable person from acting in a matter of importance to himself or to herself." N.T., 5/14/99, at 363 and 387

(emphasis added.) Appellant claims that the court failed to utilize the word "hesitate" found in Pennsylvania's standard jury instructions on reasonable doubt which provide: "A reasonable doubt is the kind of doubt that would cause a reasonable person to *hesitate* from acting in a matter of importance to himself or herself." ***Pennsylvania Standard Criminal Jury Instructions 7.01*** (emphasis added.) He asserts that counsel's failure to object to the court's instruction caused the jury to consider a heightened standard of proof.

It is well-settled that this Court must review the charge as a whole to determine if error has occurred. ***Commonwealth v. Stoltzfus***, 337 A.2d 873 (Pa. 1975); ***Commonwealth v. Smith***, 495 A.2d 543 (Pa. Super. 1985). We will not find error based on isolated excerpts. ***Commonwealth v. Ohle***, 470 A.2d 61 (Pa. 1983); ***Commonwealth v. Klinger***, 535 A.2d 1060 (Pa. Super. 1988). Furthermore, the trial court is not required to accept the precise words of a requested point for charge. All that is required is that the charge adequately, accurately and clearly explain the appropriate points of law to the jury. ***Commonwealth v. Ohle, supra***; ***Commonwealth v. Porter***, 446 A.2d 605 (Pa. Super. 1982).

Appellant points to the use of a single alternate word in the entire charge. The charge given by the court essentially mirrors the standard jury instructions. In addition to the statement referred to by Appellant the court further defined reasonable doubt as follows:

> A reasonable doubt must fairly arise out of the evidence presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt. It may not be an imagined doubt and it may not

> be a doubt that is manufactured to avoid carrying out an unpleasant duty.

N.T., 5/14/99, at 363. We conclude that this charge read in its entirety presents an accurate definition on the law of reasonable doubt. Thus, we find no merit to the claim of ineffectiveness.

Counsel's ineffectiveness is also called into question for his failure to present evidence concerning a Berks' County CYS report and for his failure to investigate and interview witnesses regarding the report. In a related claim Appellant asserts that the Commonwealth failed to provide defense counsel with a copy of this report. He asserts that their actions were in violation of ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194 (1963) and Pa. Rule of Criminal Procedure 305, both of which require the Commonwealth to turn over any favorable evidence which is material to guilt or punishment. Appellant alleges that, at the least, an evidentiary hearing is required to determine whether the Commonwealth was in possession of the report.

Appellant's reference to a report of CYS is actually a reference to two letters issued by that department. As noted by the trial court these letters were addressed and sent to Appellant and were presumably received by him and available to his counsel. The first letter provides:

> This letter is to inform you that the report of suspected child abuse on [the victim] received by this agency on January 13, 1998 is unfounded.
>
> All material and information obtained as a result of this investigation and held at this agency and ChildLine will be destroyed within 120 days.

> There are certain exceptions. For further information you may call me at. . . .

One month later a second letter was sent to Appellant. It stated:

> Within the past few months the above named child was reported as a victim of suspected child abuse or student abuse.
>
> The agency listed above [CYS] has investigated the report and determined it was Unfounded or Unfounded for School Employee because one of the following: (1) the incident did not occur, (2) the injury was not of a serious nature, or, (3) substantial evidence was not found. This letter is to notify you that the report has been expunged at our office.

Thus from the information provided by Appellant any "reports" were expunged over a year before trial. Further, Appellant has not made any offer of proof that the Commonwealth had in its possession these letters or any reports, and, more importantly, that these matters contained any exculpatory information. CYS's determination that the victim's complaints at that time were "unfounded" is a mere conclusion reached by that agency. This conclusion can not be said to be exculpatory evidence, rather it is a finding made by that agency based upon the information it had before it. That finding could not be used in support of Appellant's case as a comment on his credibility. Although CYS made a conclusion that this complaint was "unfounded," that conclusion could not be presented to a jury. Rather, the jury is [sic] this case is the arbiter of all facts and had to reach its own conclusion based upon the evidence before it.

With regard to Appellant's failure to call witnesses from CYS about information gathered in preparation of the report, Appellant has failed to name these witnesses or provide the substance of their testimony. In order to obtain relief on a claim of ineffective assistance of counsel for failing to present witnesses, Appellant must allege the names and availability of the witnesses, the substance of their testimony, how their testimony would have appreciably strengthened Appellant's defense and that trial counsel knew of the witnesses. ***Commonwealth v. Clemmons***, 479 A.2d 955 (Pa. 1984). Therefore, this claim must fail.

Appellant makes a final claim of ineffectiveness with regard to counsel's failure to file post-sentencing motions and a motion for reconsideration of sentence. Inasmuch as Appellant has not set forth any meritorious claims which would have afforded Appellant relief had counsel acted, this claim cannot succeed.

Two sentencing issues are presented for our review. Appellant asks whether his sentence of 88 months to 20 years was an abuse of the trial court's discretion. Not only does Appellant fail to state how this sentence is inappropriate as applied to him and his situation, he fails to provide this court with a concise statement of reasons seeking an allowance of appeal from the discretionary aspects of his sentences. The Commonwealth has objected to Appellant's failure to comply with Pa.R.A.P. 2119(f), thus we must decline review of this claim. ***Commonwealth v. Wall***, 539 A.2d 1325 (Pa. Super. 1988).

Incorporated in this same argument is a claim that Appellant's convictions for Statutory Sexual Assault and Involuntary Deviate Sexual Intercourse should merge.

Because this matter concerns the legality of sentence it is appropriate that we review Appellant's claim. ***Commonwealth v. Walls***, 449 A.2d 690 (Pa. Super. 1982.). However because the evidence presented by the Commonwealth through the testimony of the victim demonstrates that these sentences can represent punishment for separate and distinct acts of abuse, the sentences do not merge. ***Commonwealth v. Belsar***, 676 A.2d 632 (Pa. 1996). The victim testified that Appellant sexually assaulted her repeatedly during the entire one-year period she lived with him. She also provided details of what would occur during these assaults. In addition, she testified to a specific act of abuse which occurred on New Year's Day. Thus, we need not consider whether these sentences for these crimes must merge because there were separate and distinct acts committed on the victim.

Finding no merit to the claims raised by Appellant, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: DEC 12 2000

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | No. 551 MAL 2003 |
| Respondent | : | Petition for Allowance of Appeal from the Order of the Superior Court |
| v. | : | |
| RONALD L. RAY | : | |
| Petitioner | : | |

**ORDER**

**PER CURIAM**

AND NOW, this 27th day of February, 2004, the Petition for Allowance of Appeal is hereby DENIED.